No. 482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 482

BURGESS-NORTON MFG. CO.,

Appellant,

vs.

RICHARD J. LYONS, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF ILLINOIS

Pursuant to Rule 16(b) of the Revised Rules of the Supreme Court of the United States, appellees in the above entitled case move to dismiss the appeal on the ground that no substantial federal question is presented.

OPINION BELOW

The opinion of the Illinois Supreme Court sustaining the validity of the Use Tax Act in the instant case is reported in 11 Ill. 2d at page 294. The Illinois Court held that this case was governed by the decision in *Turner* v.

Wright, 11 Ill. 2d 161, 142 NE 2d 84. In this connection the Illinois Court said at page 295:

> "The questions raised in this proceeding were determined at the March term of this Court in *Turner* v. *Wright*, *ante*, p. 161, wherein we held the Use Tax Act to be constitutional, and wherein the present plaintiff filed brief and argument as amicus curiae. Therefore the judgment of the trial court is affirmed."

Turner v. *Wright* is presently pending on appeal to this Court at the October term in Docket No. 405. The appellees, here, are also the appellees in the *Turner* case and have filed a similar motion to dismiss the appeal in that case on the ground that no substantial federal question is presented.

QUESTION PRESENTED

Where, as here, the Illinois Court has found that the Illinois Use Tax satisfies the requirements of equal protection of the laws under the Illinois Constitution, and there is no question of the tax being a burden on interstate commerce, have appellants presented a substantial federal question under the claim that said Act violates the equal protection clause of the 14th Amendment of the United States Constitution.

STATUTE INVOLVED

The statute involved is the Illinois Use Tax Act (Pars. 439.1-439.18, Ch. 120, Vol. 2, pgs. 816-820, Ill. Rev. Stats. 1955).

STATEMENT

Nature of Illinois Use Tax Act

The Illinois Use Tax Act was designed to and does complement the admittedly valid Retailers' Occupation Tax Act.

Under the Use Tax Act, a tax is imposed "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." (Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817). The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act. It applies whether the property is purchased in Illinois or elsewhere. Retailers are required to collect the tax from users by adding the tax to the selling price of the tangible personal property when it is sold for use. (Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817).

The use tax does not apply to out-of-state transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sales or use tax has been paid to another State, to the extent of the tax so paid. (Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817).

A reading of pertinent provisions of the Act clearly demonstrate its complementary character and the studied effort of the legislature to avoid unfairness or inequality of the tax burden imposed by both Acts in question.

To prevent double taxation i.e., the application of the Retailers' tax and the use tax to the sale of the same tangible personal property, the Use Tax Act provides for off-setting the taxes in question in the following manner in Par. 439.9, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 818 which is Section 9 of the Act:

> "The first remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected by him to the extent he is required to remit, and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property."

Clear evidence of the complementary character of the two Acts in question and the legislative intention that only one tax shall apply to any transaction is found in Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817 which is Section 3 of the Act:

> "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

Adequate safeguards against actual or likely multi-state taxation are found in Par. 439.3, Ch. 120, Ill. Rev.

Stats. 1955, Vol. 2, p. 817, which is section 3 of the Act. These provisions forbid the application of the tax in the situations summarized as follows:

(1) Where a non-resident brings property into the State temporarily or while passing through the State;

(2) Where the property is acquired outside this State and is moved into this State for use as rolling stock moving in interstate commerce;

(3) Where a similar tax has been paid in another State to the extent of the amount of such tax so paid in the other State.

(4) Temporary storage of property acquired outside and brought in and used solely outside the State or attached to property used solely outside the State.

NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL

ARGUMENT

I.

Summary

The Illinois Use Tax Act is not unique legislation in any respect. It was designed to and does complement the admittedly valid Retailers' Occupation Tax Act. The object and purpose of the Act is identical with the acts of many other states namely, to equalize the tax burdens which heretofore were unequal and discriminated against Illinois citizens and Illinois retail merchants as the Retailers' Occupation Tax Act, standing alone, could not reach out-of-state purchases and transactions in interstate commerce. (*Norton Co.* v. *Department of Revenue*, 405 Ill. 314, vacated and remanded *Norton* v. *Department of Revenue*, 340 U. S. 534)

As the Use Tax applies primarily to goods shipped into Illinois in interstate commerce and purchases of goods made outside the State for use within the State, the practical effect of this complementary taxing system is to afford the Illinois retail merchant some measure of protection against competition with out-of-state sellers not subject to a retailers' tax. Furthermore, it produces revenue for the State that would otherwise be lost. Thus protection of the Illinois merchant is, in fact, protection also for the

valid Retailers' Occupation Tax. If the Illinois retailer is forced out of business or deprived of part of his business by a tax that does not reach his out-of-state competitor this revenue is lost to the State. In addition, some Illinois citizens were not carrying their fair share of the State's tax burden as they made purchases in other states to avoid the payment of local retailers' tax.

The very purpose of the Use Tax Act is to establish uniformity of the legal and economic burden of taxation for purchasers and users of tangible personal property sold at retail and to provide a uniform tax basis consistent with the pronouncements of the Illinois Court and this Court. Appellant's argument is directed to the form and mechanics of the imposition of the tax and wholly fails, as we will hereinafter demonstrate under Points II and III of this brief, to establish that the Act is unconstitutional as a denial of equal protection of the law.

The equal protection clause of the 14th Amendment does not prevent Illinois from adjusting its system of taxation in all proper and reasonable ways or compel Illinois to adopt an iron rule of equal taxation. (*Bell's Gap Railroad* v. *Pennsylvania* 134 U. S. 232, 237; *Merchant's Bank* v. *Pennsylvania* 167 U. S. 461, 464). The power of the state in respect to the matter of taxation is very broad so far as the Federal Constitution is concerned and it may

be laid down as a general rule that mere inequality or exemptions in the matter of state taxation are not forbidden by such Constitution. (*Beers* v. *Glynn* 211 U. S. 477, 484-85). When the constituted authority of the State undertakes to exert the taxing power, and the question of its action is brought before this Court, every presumption in its favor is indulged and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. (*Walters* v. *City of St. Louis* 347 U. S. 231, 237-238).

There is no question here involved that this tax is a burden on interstate commerce. In this connection the Illinois Court in its opinion in *Turner* v. *Wright*, 11 Ill. 2d. 161 at p. 164 said:

> "The validity of the Statute under the Commerce Clause of the Federal Constitution is not challenged * * *."

This Court has repeatedly sustained Use Tax Acts of other states based on his same scheme of complementary laws as not violating the commerce clause of the U. S. constitution. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335; *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.)

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, this Court sustained the validity of the use tax of the State of

Washington, and approved its purpose and object, which is identical with the Illinois tax, by saying at page 581:

> "The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?"

In view of the previous decisions of this Court, and the lack of merit in appellant's specific contentions that the Use Tax Act violates the 14th Amendment of the United States constitution, this appeal should be dismissed. We will take up and dispose of appellant's specific contentions under Points II and III of this brief.

II.

THE ILLINOIS USE TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Section 3 of the Illinois Use Tax Act,[1] in exempting purchases at retail in kinds of transactions in which the seller would not incur retailers' occupation tax liability if all elements of the sale occurred in Illinois, does not create a discriminatory classification in violation of the Fourteenth Amendment of the Constitution of the United States. If a Use Tax Act is to complement a sales tax law or an occupation tax law, it is not unreasonable for the Use Tax Act to be predicated on the same classification (and therefore to contain the same exemptions) as the law that is being complemented. On the contrary, no matter what the exemptions in the law that is being complemented may be, it is entirely logical for the complementing statute to contain the same exemptions except for the loophole or loopholes which the complementing statute is designed to close. A Use Tax Act is generally aimed only at broadening the tax base to the extent of closing an interstate commerce loophole (i.e., to the extent of taxing out-of-State purchases that cannot be reached under the sales tax or occupation tax law that is being complemented) and (in the case of the

[1] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.3, vol. 2, p. 817.

Illinois Constitution, because of the State Court's interpretation of it[2]) to the extent necessary to tax the same kinds of purchases when made in Illinois since the retailers' occupation tax (unlike the sales taxes of most states) does not technically and legally fall on the buyer when he does his buying in Illinois. However, there is no constitutional requirement or other good reason which would make it necessary or even desirable for the Illinois use tax to go even further and try to tax kinds of transactions (such as isolated or occasional sales made by persons who are not retailers; sales that are incidental to the seller's engaging in a service occupation, etc.) which are not subject to the Illinois Retailers' Occupation Tax Act[3]—the law that is being complemented. In the required respects, the Illinois Use Tax Act is complementary except in an immaterial, nondiscriminatory respect as to the value of trade-ins, which will be discussed more fully herein later.

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[2] Compare *People* v. *Carpentier*, 2 Ill. (2d) 468, 118 N. E. (2d) 429 (which invalidated a use tax which sought to complement the retailers' occupation tax as to motor vehicles, but which was levied only on purchases made outside Illinois) with *Johnson* v. *Halpin et al.*, 413 Ill. 257, 108 N.E. (2d) 429—Certiorari denied—345 U. S. 923, 73 S. Ct. 781, 97 L.ed. 668 (which sustained the Illinois Cigarette Use Tax Act in complementing the Illinois Cigarette Tax Act by means like those employed by the Legislature in making the present Use Tax Act complement the Retailers' Occupation Tax Act—i.e., by having the use tax apply to local purchases as well as to out-of-State purchases, and by having the retailer who has collected the use tax from the purchaser retain this tax to the extent to which he is liable to pay and does pay retailers' occupation tax to the State on the same sale).

[3] Illinois Revised Statutes, 1955, Chapter 120, Paragraphs 440, 453, vol. 2, pp. 820-823.

On the question of classification, which can come into question in relation to the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United States, this Court has often said that it will not disturb the State Legislature's establishment of a classification unless the distinctions resulting from the classification are so arbitrary and unreasonable as to have no apparent basis in fact. For example, see *Heisler* v. *Thomas Colliery Co.*,[1] in which this Court upheld the action of the Pennsylvania Legislature in classifying bituminous coal differently from anthracite coal for tax purposes. Although both items are coal, the Court pointed out that there are differences in the physical properties and the uses of the two types of coal and that this would be sufficient to justify the Legislature of Pennsylvania in imposing a tax applicable to the one type of coal, but not applicable to the other. The Court made it clear that it would not disturb the classification made by a State Legislature for tax purposes unless the classification was so arbitrary and unreasonable as to have no apparent basis in fact whatever. There is nothing arbitrary or unreasonable about exempting purchases from sellers who are not retailers from a Use Tax Act which seeks to complement a tax law whose scope is limited to the taxation of sales that are made by retailers. On the contrary, it would be unreasonable to demand that the

[1] 260 U. S. 245.

complementing use tax reach out and tax kinds of uses which are not within the statute that is being complemented when a question of its application to a seller who makes sales for use arises.

The Illinois Supreme Court justified the classification by which the Illinois Use Tax Act does not tax every conceivable kind of use (but seeks only to tax the kinds of transactions—purchases at retail from retailers—which are subject to the retailers' occupation tax when the question of the seller's tax liability on an Illinois sale is involved) in the following language:

> "There are actions that the retailers' tax does not reach, because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element of sale. (See, e.g., *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.
>
> "The argument would, we think, be persuasive *if the use tax stood alone*, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. *It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose.* The question here is not whether the legislature *is required* to shape the use

tax that it imposes to conform to the tax upon retailers, but whether it *may constitutionally do so.* We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden the base of the use tax beyond the limits of the occupation tax upon retailers is not before us.'"[5]

(Emphasis supplied.)

Appellant appears to be trying to establish the dilemma that Illinois cannot constitutionally do what other use tax states have accomplished, unless Illinois makes the use tax serve not only the accepted function of broadening the tax base so that purchasers pay a tax on kinds of sales that are already subject to a local tax whether the purchases are made in the taxing state or outside such state, but also the function of broadening the base of the retailers' occupation tax to include all purchases of any kind from anyone anywhere for use in Illinois. Yet this latter kind of broadening of the local tax base has not been the historical function of a use tax and has not been required in other states to make the use tax constitutional. For example, the Iowa Use Tax Act exempts the use of tangible personal property the gross receipts from the sale of which are exempted from the retail sales tax by the terms of the Iowa sales tax law.[6] Similarly, the Kansas Use Tax Act provides

[5] *Turner* v. *Wright*, 11 Ill. (2d) 161, at pages 169 and 170; 142 N.E. (2d) 84.

[6] Iowa—Commerce Clearing House Reports—Page 6131, Paragraph 60-279.

that it does not apply in respect to the use, in Kansas, of tangible personal property brought into or used in Kansas if such property would not have been subject to the tax under the provisions of the Kansas Retailers' Sales Tax Act if purchased in Kansas.[7] Other examples of the same kind of coextensive exemption are those in Arkansas[8] and Colorado[9] use tax laws. These provisions correspond in their significance to the catch-all exemption provision in Section 3 of the Illinois Use Tax Act[10] to the effect that the use of the property is not subject to the use tax if the seller would not incur retailers' occupation tax liability despite all elements of the sale having occurred in Illinois. In practically all states, the use tax exempts some kinds of uses and does not, by any means, apply uniformly to every kind of use or to every kind of out-of-state purchase for use.[10]

If the use tax laws of other states do not violate "equal protection" requirements even though they fail to

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[7] Kansas—Commerce Clearing House Reports—Page 6112, Paragraph 60-253.

[8] Arkansas—Commerce Clearing House Reports—Page 6102, Paragraph 60-241.

Colorado—Commerce Clearing House Reports—Page 6128, Paragraph 60-250.

[9] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.3.

[10] For example, for a list of exemptions from the State of Washington use tax, see Washington—Commerce Clearing House Reports—Pages 6127 through 6132, Paragraphs 60-202 through 60-214; for a list of specific exemptions from the Kansas use tax, see Kansas—Commerce Clearing House Reports—Pages 6112 through 6114, Paragraphs 60-254 and 60-255.

tax all kinds of uses (and use tax laws have been uniformly upheld by this Court in relation to the "equal protection" clause), why should the Illinois Use Tax Act have to go farther in order to be constitutional? The obvious answer is that use taxes that complement occupation or sales taxes do not have to go beyond them and tax every kind of use in order to satisfy "equal protection" requirements, unless this Court is prepared to invalidate almost every use tax law in the country because of the fact that it does not tax every kind of use (or every kind of purchase for use) that there is, or because the use tax does not exactly complement its related sales tax on account of exempting something that is not exempted by the sales tax law or on account of taxing something which the related sales tax law does exempt.[11]

Very few sales or use tax laws tax isolated or occasional sales (Washington being an exception), so Illinois is not unique in this, as appellant would seem to imply. Is this Court going to hold all these other states' use tax laws to be violative of Federal equal protection requirements because of exempting this class of sales or purchases for use or because of exempting any other specific class of sales or purchases for use?

[11] For example, the State of Washington use tax applies to isolated or occasional sales for use even though sales of this character are exempted from the Washington sales tax (Washington Commerce Clearing House Reports—Page 6130, Paragraph 60-150 and Page 6127, Paragraph 60-203). Most states do not tax isolated or occasional sales under either the sales tax or the use tax law.

Appellees submit that the Illinois use tax does have the customary purpose of any Use Tax Act; that this is a reasonable and substantive purpose, and that the classification employed in the Use Tax Act is reasonable in relation to the purpose of that Act and therefore consonant with the requirements of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

Appellant argues that the desire to reach out-of-State purchases does not justify failing to tax purchasers from persons engaged in service occupations. Appellees reply that the purpose of taxing out-of-State buying does justify the failure to tax purchasers from Illinois and out-of-State servicemen where the Act that is being complemented does not tax similar transactions, because the purpose under discussion is fully accomplished without bringing new kinds of local transactions within the tax base. To hold otherwise would be to require the Use Tax Act to serve a purpose not generally required of use tax laws. It would mean requiring the use tax to serve a second and distinct purpose, which is completely independent of and in addition to the normal objective of placing out-of-State buying and intrastate buying on the same footing insofar as kinds of transactions that are already subject to the local tax are concerned.

Appellant contends that if the Use Tax Act taxed purchasers from servicemen, the Act still would achieve its

purpose of taxing out-of-State buying. That would also be true if the Use Tax Act went even further and tried to tax users of tangible personal property who produce the property themselves, or even users of all kinds of property (including intangibles and real estate), but the Legislature certainly does not have to make the use tax take on this last mentioned function in order to be constitutional. It should be sufficient that the Use Tax Act does what has been expected of use tax laws throughout the country over the years, and that expectation does not require trying to reach new kinds of transactions, but merely includes the requirement of trying to put what is already taxed on the same basis legally and economically whether the purchase is made in the taxing state or outside such state.

Appellees submit that, on the point that the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United States is not violated, the instant case is controlled in appellees' favor by this Court's decision in *Henneford et al.* v. *Silas Mason Company, Inc.*,[12] which sustained the constitutionality of the Washington Use Tax Act. Appellant attempts to distinguish the Henneford case and also the case of *Gregg Dyeing Company* v. *Query et al.*[13] by saying that those use taxes applied only

[12] 300 U. S. 577.
[13] 286 U. S. 472.

to purchases made outside the taxing state whereas the Illinois use tax applies to purchases that are made within Illinois or outside Illinois. However, appellant admits that the sales taxes which were being complemented by the use tax laws under consideration in the Henneford case and in the Gregg Dyeing Company case taxed purchasers who made similar purchases at retail within the taxing states. Consequently, the total legal and economic effect of the Illinois retailers' occupation tax plus the Illinois use tax would be the same as that of the sales taxes plus the use taxes that were involved in the Henneford and Gregg Dyeing Company cases.

Appellant contends that the Retailers' Occupation Tax Act has been impliedly repealed; that the Illinois Use Tax Act therefore stands alone, and that on this basis the use tax classification of taxing purchasers who buy from retailers while not taxing purchasers who buy from non-retailers cannot be justified. It seems rather obvious that if the Illinois Legislature had meant to repeal one of its most important revenue statutes which has been on the books for more than 24 years (it became effective July 1, 1933), the Legislature would have expressly repealed such statute and not left it to a matter of implication and therefore to conjecture. On the contrary, it seems clear that the Retailers' Occupation Tax Act continues to have vitality and continues to be the keystone of the retail excise

tax structure in Illinois, with the Use Tax Act being built around the Retailers' Occupation Tax Act. The Legislature's intention to supplement the retailers' occupation tax with the use tax, rather than to substitute the use tax for the retailers' occupation tax, is evidenced by the offset provision in Section 9 of the Use Tax Act which appellant criticizes as violating "due process" requirements and which allows the retailer to retain the use tax that he collects to the extent to which he is liable to pay and does pay retailers' occupation tax to the Department on the same transaction. Similar evidence of the Legislature's intention to continue the Retailers' Occupation Tax Act in effect is found in the fact that there are numerous other cross references to the retailers' occupation tax and the Retailers' Occupation Tax Act in the Use Tax Act.[1] These cross references would not be necessary (and in fact would be meaningless and farcical) if the Legislature had thought that the Retailers' Occupation Tax Act would not be in effect any longer. The Illinois Legislature has further recognized the continued existence of the Retailers' Occupation Tax Act this year by amending it on several occasions at the 1957 Legislative session. All evidence points emphatically to the continued existence of the Retailers'

[1] Such cross references will be found in Sections 2, 3, 6, 7, 8, 9 and 14 of the Use Tax Act (Illinois Revised Statutes, 1955, Chapter 120, Paragraphs 439.2, 439.3, 439.6, 439.7, 439.8, 439.9 and 439.14).

Occupation Tax Act. In fact, without the Retailers' Occupation Tax Act from which the Use Tax Act incorporates numerous sections by reference,[2] the Use Tax Act itself would be lacking in most of its enforcement procedures and might be too incomplete to constitute a law.

Appellant contends that the Use Tax Act does not complement the Retailers' Occupation Tax Act for the reason that, where traded-in property is a part of the consideration for a sale, the use tax applies to more of the selling price than the retailers' occupation tax does because the use tax applies to the receipts in money plus the value of the trade-in, whereas the retailers' occupation tax applies only to the receipts in money. However, this produces no discrimination and does not result in any financial gain to any private person. If the user makes his purchase outside Illinois from an unregistered seller, so that he pays the use tax directly to the State, he will pay 2½% of the full selling price (money paid plus the value of the trade-in). If the user makes his purchase from a registered retailer, he will pay the same amount of use tax to the seller. The seller is required by Section 9 of

[2] Section 12 of the Use Tax Act (Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.12), in incorporating numerous Sections from another Statute by reference, failed to specify that the other statute is the Retailers' Occupation Tax Act, but that was clearly the Legislature's intention from an examination of the entire Act, and the Illinois Supreme Court so found in its opinion in *Turner* v *Wright*, 11 Ill. (2d) 161, at page 173.

the Use Tax Act[18] to remit the use tax that he collects to the State except to the extent that he has an offsetting retailers' occupation tax liability on the same transaction. In such a case, the retailer would pay 2½% of the receipts in money to the State as retailers' occupation tax, and he would pay 2½% of the value of the trade-in to the State as use tax. But the State would get all of the tax (2½% on the full selling price, including the receipts in money and the value of the trade-in), and the user would pay the same amount of tax whether he pays the tax to the State or to the retailer.

In its opinion in this case, the Illinois Supreme Court pointed up the foregoing explanation in the following passage:

> "There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter on 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, 'including cash, credits, service and property of every kind or nature * * *.' (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the pur-

[18] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.9, vol. 2, p. 818.

chase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50. 'The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction.' No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights.'"[1]

It is further pointed out that a Use Tax Act does not violate equal protection requirements of the Federal Constitution simply because such Act does not meticulously follow the law that it seeks to complement and because there are some variances or discrepancies between the two Acts. An examination of practically every sales and use tax combination in the country will show that they do not cover exactly the same kinds of transactions with the use tax only adding the feature of taxing out-of-state purchases which would be subject to the complemented sales tax if the purchases were made in the taxing state. In particular, a use tax law is not invalid because of taxing something

[1] *Turner* v. *Wright*, 11 Ill. (2d) 161, at pages 168 and 169, 142 N.E. (2d) 84.

to which the complementary sales tax does not apply. For example, as was mentioned previously in a footnote, the State of Washington use tax applies to isolated or occasional sales for use even though the Washington sales tax does not apply to transactions of that character.[18] Nevertheless, this Court upheld the Washington use tax law as not violating equal protection requirements of the Fourteenth Amendment of the Constitution of the United States.[19] Although the Washington use tax law taxes isolated or occasional sales, most states do not tax isolated or occasional sales under either the sales tax or the use tax law.

There is no merit or substance to appellant's contention that the Use Tax Act violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States by providing for a tax refund when property is returned by the purchaser to the seller in the case of taxpayers who purchase from and remit the use tax to registered retailers, but not when property is returned by the purchaser to a seller who is not registered to collect the use tax so that the purchaser will have paid the use tax directly to the State of Illinois.

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[18] Washington—Commerce Clearing House Reports—Page 6110, Paragraph 60-150 and Page 6127, Paragraph 60-203.

[19] *Henneford et al.* v. *Silas Mason Company, Inc.*, 300 U. S. 577.

The purchaser who pays the use tax directly to the State under Section 10 of the Use Tax Act[20] is entitled to the returned merchandise credit (when applicable) because Section 10, in effect, so states by incorporating, into itself (Section 10), the applicable provisions of Section 9[21] which are not already spelled out in their own way in Section 10. The pertinent sentence in Section 10 of the Use Tax Act reads as follows:

> "To the extent to which they may be pertinent, all of the provisions of Section 9 with reference to returns and payments shall be applicable to the returns and payments herein required."

The provision in Section 9 of the Use Tax Act relative to the credit on returns for returned merchandise would thereby be incorporated by reference into Section 10 of the Act and would apply to users who remit use tax directly to the Department. It seems clear, therefore, that appellant has misconstrued or misunderstood the Use Tax Act on the point under discussion because all users who pay the use tax to anyone are entitled to a returned merchandise credit under the proper circumstances either under Section 9 or under Section 10 of the Act, so the discrimination which appellant complains of simply does not exist.

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[20] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.10, vol. 2, p. 819.

[21] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.9, vol. 2, p. 818.

II.

SECTION 9 OF THE ILLINOIS USE TAX ACT DOES NOT VIOLATE DUE PROCESS REQUIREMENTS

The offsetting provision in Section 9 of the Illinois Use Tax Act[2] does not result in a gift of public funds for a private purpose and does not constitute a taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Appellant's contention that the Illinois Retailers' Occupation Tax Act has been repealed by implication or otherwise has already been dealt with fully and answered by appellees under Point I of this motion.

Assuming that the Retailers' Occupation Tax Act has not been repealed, appellees believe that the Illinois Supreme Court dealt effectively in its opinion in the Turner case (which controlled the disposition of this case in the Illinois Supreme Court) with appellant's contention that the offsetting provision in Section 9 of the Use Tax Act constitutes a gift of public money for private purposes, in the following excerpt from the Court's opinion:

> "While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls

[2] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.9, vol. p. 818.

upon purchases made within the State as well as upon those made outside, and thus introduces a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art. IV, sec. 23.

"The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

"It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the re-

tailer does not constitute a debt owed by him to the State when he 'is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.' (Section 8.). *Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.*" (Emphasis supplied.)[23]

When the true purpose and function of the offset provision in Section 9 of the Illinois Use Tax Act is thus understood and considered, it should be apparent that the object of that purpose is a public purpose and that it does not result in a gift of public funds for a private purpose. Therefore, no private property is being taken without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. Is it not reasonable to say that something which is really just a formality, but which is necessary to satisfy Illinois constitutional requirements of uniformity as interpreted by the Illinois Supreme Court, is justifiable and serves a public purpose where the total legal and economic effect is no different than it would have been if the procedure employed had been copied after that which is in use in other states which are

[23] *Turner* v. *Wright*; 11 Ill. (2d) 161, at pages 166, 167 and 168, 142 N.E. (2d) 84.

free, under their State Constitutions, to employ such other procedure or form of statutory enactments?[24]

The offset provision under consideration is not for the *benefit* (meaning profit or financial gain) of anyone, but is simply aimed at preventing two taxes from reaching the State Treasury on Illinois sales. It is submitted that this is a justifiable public purpose and not a gift of public funds for private purposes, and that no one in the process is being deprived of property without due process of law. There is therefore no Federal question of substance presented by appellant's contention that the offsetting provision in Section 9 of the Illinois Use Tax Act violates due process requirements of the Fourteenth Amendment of the Constitution of the United States.

[24] In *People* v. *Carpentier*, 2 Ill. (2d) 468, 118 N.E. (2d) 315, the Illinois Supreme Court had held that a use tax on motor vehicles could not be levied without violating the Court's understanding of the Illinois constitutional requirement of uniformity where such use tax applied only to purchases made outside Illinois. This was true, the Court found, because the statute that was being complemented (the Retailers' Occupation Tax Act), though applying to retail sales of motor vehicles in Illinois, was levied on the seller rather than on the purchaser, so there would technically be no legal burden of a tax on purchasers who bought their motor vehicles in Illinois. Earlier, in *Johnson* v. *Halpin*, 413 Ill. 257, 108 N.E. (2d) 429—Certiorari denied—345 U. S. 923, 73 S. Ct. 781 97 L.ed. 668, the Illinois Supreme Court had upheld the constitutionality of the Cigarette Use Tax Act which employed the same mechanics (including the offsetting provision in the hands of tax collecting sellers) in complementing the Illinois Cigarette Tax Act as that employed by the Illinois Legislature in this instance in making the Use Tax Act complement the Retailers' Occupation Tax Act

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal from the judgment of the Supreme Court of Illinois should be dismissed as it does not present a substantial Federal question for the decision of this Court.

Respectfully submitted,

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